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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of JASON R. and PAULINA FLORENCE ARZOLA.
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JASON RENE ARZOLA,

Appellant,

v.

PAULINA FLORENCE ARZOLA,

Respondent.

D046905

(Super. Ct. No. D479283)

APPEAL from a judgment and postjudgment order of the Superior Court of San Diego County, Randa Trapp, Judge. Appeal dismissed.

Jason Rene Arzola appeals the family court's judgment in this dissolution action between him and Paulina Florence Arzola and its order denying him a new trial based on newly discovered evidence. Jason contends that the court improperly made a factual finding prior to the submission of evidence at trial and that it should have granted him a new trial in light of his discovery of new evidence after trial. Paulina

requests that we dismiss the appeal as untimely. We conclude that Paulina's request is well taken and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Jason and Paulina were married in 1984. In 1999, Jason moved out of the parties' house and in August 2003, he filed a petition to formally dissolve the marriage. The parties were able to reach agreement on all significant matters except the characterization and division of the real property and, in July 2004, the court conducted a short cause trial relating to that contested issue. At trial, the parties introduced evidence that they had entered into an agreement in 1999, but that no copies of the agreement could be located. The court permitted parol evidence as to the terms of the agreement, particularly as it related to the ownership of the real property. Based on the evidence presented, the court concluded that Paulina had bought out Jason's interest in the real property in 1999 and that the real property was thus her separate property. The court instructed Paulina's counsel to prepare the judgment.

In October 2004, Jason moved for a new trial relating to the award of the real property to Paulina, contending that he had found a copy of the written agreement and that, contrary to Paulina's trial testimony, it merely provided her with the exclusive right to use the property "until such time as the residence . . . is sold." Paulina opposed Jason's motion on a number of grounds, including that his contention he just found the agreement was incredible and that it was more likely he failed to timely produce the document on purpose. (Notably, however, Paulina did not deny that the

document was an accurate copy of the agreement the parties had signed.) The court did not rule on the motion for new trial within 60 days and thus the motion was denied by operation of law in December 2004. (Code Civ. Proc., § 660.)

In March 2005, Paulina's counsel prepared a "judgment after trial" setting forth the specific terms of the parties' agreement and the court's rulings relating to the real property, which Jason's counsel approved as to form. (All further dates are in 2005 except as otherwise noted.) On April 28, Paulina's counsel filed a judgment of dissolution on Judicial Council Form FL-180 that referred to and attached a copy of the judgment after trial. That same date, the court clerk prepared a notice of entry of judgment specifying, erroneously, that the judgment of dissolution was entered in July 2004 rather than on April 28, 2005. On May 2, Paulina's counsel mailed Jason's counsel conformed copies of the judgment of dissolution and the judgment after trial.

On July 28, Jason filed a notice of appeal from the "order entered by the court on April 28" and its purported ruling on the motion for new trial in February. Jason filed his opening brief in this court on October 26 and, three weeks later, Paulina filed her motion to dismiss the appeal as untimely.

DISCUSSION

A timely filed notice of appeal is a jurisdictional prerequisite to appellate review. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) California Rules of Court, rule 2 governs the time for filing a notice of appeal, stating in pertinent part:

"(a) Normal time

"Unless a statute or rule 3 provides otherwise, a notice of appeal must be filed on or before the earliest of:

"(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;

"(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or

"(3) 180 days after entry of judgment."

Provided that the judgment is entered before the notice of entry is served, the date on which the judgment is actually entered is irrelevant for purposes of computing the period within which an appeal must be filed under California Rules of Court, rule 2(a)(1) or (2). (*Delmonico v. Laidlaw Waste Systems, Inc.* (1992) 5 Cal.App.4th 81, 85; see also *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc., supra*, 15 Cal.4th at p. 60, fn. 3.) Thus, a notice of entry is effective to trigger the 60-day period under these subsections of California Rules of Court, rule 2 even if, as here, it incorrectly states the date on which the judgment to which it relates was entered. (See *Delmonico v. Laidlaw Waste Systems, Inc., supra*, 5 Cal.App.4th at p. 85 [Cal. Rules of Court, rule 2 (a)(2)]; compare *Slawinski v. Mocettini* (1965) 63 Cal.2d 70, 71 [interpreting former Cal. Rules of Court, rules 2 and 3, which specified that the time for filing a notice of appeal ran from *the date of entry*, not notice of entry].)

Jason nonetheless contends that the notice of entry mailed by the clerk on April 28 was not sufficient to trigger the application of California Rules of Court, rule 2(a)(1) because it referenced only the judgment of dissolution, but not the judgment after trial. However, although a bifurcated interlocutory judgment of dissolution is appealable before there is a final judgment disposing of any remaining issues between the parties (Code Civ. Proc., § 904.1, subd. (a)(1); *In re Marriage of Fink* (1976) 54 Cal.App.3d 357, 361-367; see 3 Raye & Pierson, Cal. Civil Practice Family Law Litigation (2003) Review of Judgments and Orders, §§ 17:43 & 17:45, pp. 41-44), here the judgment of dissolution specifically referred to and incorporated the judgment after trial, which Jason's counsel had approved as to form and was thus clearly aware of prior to the date of the notice of entry. These circumstances do not present a "doubtful case" where we can conclude that Jason timely appealed the judgment "without doing violence to applicable rules." (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674, quoting *Slawinski v. Mocettini*, *supra*, 63 Cal.2d at p. 72.) Rather, under California Rules of Court, rule 2(a)(1), the time for Jason to notice an appeal from the judgment started to run from the date of the notice of entry of the judgment of dismissal and expired on June 27. Because Jason did not file his notice of appeal until July 28, we must dismiss the appeal.

DISPOSITION

The appeal is dismissed. Paulina is awarded her costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.